IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 23753-2-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
DENIS F. EKKERT,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

KATO, J.—Denis Ekkert appeals his conviction for one count of first degree assault with a deadly weapon. He contends he received ineffective assistance of counsel; the evidence was insufficient to support the conviction; the court erred by admitting eyewitness identification evidence; and cumulative error requires reversal of his conviction. We affirm.

On April 18, 2004, David Felten was driving home when he noticed a car tailgating him. The car pulled up next to Mr. Felten and an occupant of the vehicle gave him "the finger." Report of Proceedings (RP) at 78. He gave "the finger" back and continued driving home. Mr. Felten then turned onto a side street and saw the other car turning around.

When Mr. Felten arrived home, he parked and opened the car door to get out. The other car approached and stopped in front of his. Mr. Ekkert jumped out of the car and stood in front of Mr. Felten with his hand behind his back. The car's other occupants got out and surrounded Mr. Felten, who then felt a stab to his stomach. Mr. Ekkert and the others quickly got back into their car and left. Mr. Felten looked under his shirt and saw he was bleeding.

When police arrived, Mr. Felten provided a description of Mr. Ekkert and was taken to the hospital by ambulance. Michael B. Moore, M.D., the on-call trauma physician, examined Mr. Felten, who had a 1.5 centimeter long stab wound on his abdomen.

Officer Michelle Madsen brought Mr. Ekkert to the hospital for identification. Mr. Felten positively identified him. Mr. Ekkert was arrested and charged with first degree assault with a deadly weapon.

On December 13, 2004, Mr. Ekkert presented the court with a waiver of jury trial. He told the court he had discussed the waiver with his attorneys and he understood he had the right to a jury trial. He understood that by waiving his right to a jury trial, he was subjecting himself to a bench trial. He acknowledged the waiver was made voluntarily. The court signed the waiver.

The court found Mr. Ekkert guilty as charged. This appeal follows.

Mr. Ekkert claims ineffective assistance of counsel. A defendant alleging ineffective assistance must show not only that counsel's representation was deficient, but also that the deficiency caused prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Even if counsel's representation was deficient, the claim will fail absent a showing of prejudice. *Hendrickson*, 129 Wn.2d at 78.

Counsel's performance is deficient if it falls "below an objective standard of reasonableness" under prevailing professional norms. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992); *Strickland*, 466 U.S. at 687. But there is a strong presumption counsel's performance was reasonable, *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990), and counsel's tactical decisions must be distinguished from ineffectiveness. *State v. Brett*, 126 Wn.2d 136, 198-99, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). Moreover, counsel's failure to pursue a tactic substantially likely to fail is not evidence of ineffective representation. *State v. Adams*, 91 Wn.2d 86, 90-91, 586 P.2d 1168 (1978). We view counsel's

performance against the entire record, requiring the defendant to demonstrate there was no sound tactical or strategic reason for counsel's actions. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Mr. Ekkert contends his trial counsel was ineffective for failing to advise him of the risks associated with waiving the right to a jury trial. He argues he was confused and his counsel "brushed aside" his concerns. Appellant's Br. at 17.

During the waiver colloquy, Mr. Ekkert requested an opportunity to speak with defense counsel. After speaking with Mr. Ekkert, counsel told the court: "Your Honor, from my understanding, he just expressed a confusion. He thought perhaps you are telling him that he needs to have a jury. I explained to him it was a right, but he doesn't have to." RP at 14. The court then asked Mr. Ekkert whether there was anything he did not fully understand about his right to a jury trial. Mr. Ekkert responded, "I just feel it would be best for me to go in front of the judge instead of a jury." RP at 15.

"In a non-capital criminal case, the accused may waive his right to a trial by jury." *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Waiving the right to a jury trial can be a tactical decision. *State v. Likakur*, 26 Wn. App. 297, 303, 613 P.2d 156 (1980). Counsel's advice on waiver is deemed "within the

area of judgment and trial strategy and as such rests exclusively in trial counsel." *Thomas*, 71 Wn.2d at 471.

Here, the record reveals Mr. Ekkert voluntarily waived his right to a jury trial. The court questioned him about his waiver and he acknowledged it was voluntary. The court asked Mr. Ekkert if he had discussed the waiver with his attorney. He stated counsel had explained the issue to him well. There is no indication counsel failed to advise him concerning the risks of waiving a jury trial or disregarded his concerns. Mr. Ekkert himself recognized the waiver of his right to a jury trial was a tactical decision. Counsel was not ineffective.

Mr. Ekkert next contends his counsel was ineffective for failing to discuss with him the impact of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). He argues he should have been advised that his right to a jury trial extended to sentencing enhancements.

In *Blakely*, 542 U.S. at 303, the U.S. Supreme Court held that a defendant has a constitutional right to have a jury determine whether the factors permitting an exceptional sentence have been proven beyond a reasonable doubt.

Here, there is no indication in the record whether counsel discussed *Blakely* with Mr. Ekkert. Nonetheless, even if counsel did not discuss the issue

with him, he waived his right to a jury trial and chose the judge to be the factfinder. *See Blakely*, 542 U.S. at 310 (stating that the State is free to seek judicial sentence enhancements when defendant consents to judicial fact finding). Counsel thus was not ineffective for failing to discuss *Blakely* with his client.

Mr. Ekkert next contends he was denied effective assistance when his counsel failed to object to the testimony of juvenile probation officer, Tina Miller-Ayres. At the CrR 3.5 hearing, he sought to suppress statements made to the arresting officer. He argued he was unable to make a knowing and intelligent waiver of his *Miranda*[1] rights because of his inability to understand the English language. In rebuttal, the State called Ms. Miller-Ayres. She testified she did not speak Russian, but had spoken with Mr. Ekkert a few times both in person and on the telephone. She felt she was able to communicate with Mr. Ekkert on those occasions.

He argues defense counsel was ineffective for failing to object to this testimony under ER 404(b), providing that evidence of a defendant's other crimes or bad acts is not admissible to prove his character as a ground for suggesting his conduct on a particular occasion was in conformity with it. But such evidence

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

The State did not seek to use this evidence to establish Mr. Ekkert's prior misconduct. The testimony was used to rebut his assertion he did not understand the English language. Moreover, it is well established that a trial court is "not bound by the Rules of Evidence" when it determines questions concerning the admissibility of evidence. ER 104(a); *see also* ER 1101(c)(1), (3). Defense counsel was not ineffective for failing to object to the testimony on ER 404(b) grounds.

Mr. Ekkert also contends counsel was ineffective for failing to properly brief cases for the court during closing argument. But he does not address this issue in his brief so it is deemed waived. *See* RAP 10.3(a)(5); *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986) (parties waive claimed errors when they fail to provide argument or citations to authority).

Mr. Ekkert also contends defense counsel was ineffective for failing to argue self-defense. "A claim of self-defense . . . is available only if the defendant first offers credible evidence tending to prove that theory or defense." *State v. Haydel*, 122 Wn. App. 365, 370, 95 P.3d 760 (2004); *State v. Janes*, 121 Wn.2d

220, 237, 850 P.2d 495 (1993). Counsel's decision not to claim self-defense when there is no evidence supporting it is not ineffective assistance. *See State v. Johnson*, 113 Wn. App. 482, 493, 54 P.3d 155 (2002), *review denied*, 149 Wn.2d 1016 (2003).

Mr. Ekkert argues counsel should have developed this defense from the testimony of Mikhail Vorontsov and Semen Kutsar. But there is no evidence in the record that Mr. Ekkert had a viable self-defense claim. Mr. Vorontsov testified he heard loud voices and an exchange of punches between Mr. Ekkert and Mr. Felten. At one point, he saw Mr. Felten bent over and holding his stomach. Mr. Kutsar testified he saw somebody push Mr. Ekkert. He said Mr. Ekkert went "towards him" and got into the car. RP at 213, 215. He told Mr. Kutsar to "get out of here." RP at 215. There was no evidence Mr. Felten was the aggressor and no reasonable probability of a different outcome had counsel approached the case as Mr. Ekkert now suggests. Trial counsel was not ineffective for failing to argue self-defense.

Mr. Ekkert next argues counsel was ineffective for failing to ensure the interpreter did not have a conflict of interest and for failing to ensure an interpreter was present at all times during the trial. The right of a defendant in a criminal

case to have an interpreter is based upon the Sixth Amendment constitutional right to confront witnesses and "the right inherent in a fair trial to be present at one's own trial." *State v. Woo Won Choi*, 55 Wn. App. 895, 901, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002 (1990). It is also

> the policy of this state to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

RCW 2.43.010.

Under RCW 2.43.050, an interpreter takes

> an oath affirming that the interpreter will make a true interpretation to the person being examined of all the proceedings in a language which the person understands, and that the interpreter will repeat the statements of the person being examined to the court or agency conducting the proceedings, in the English language, to the best of the interpreter's skill and judgment.

"All language interpreters serving in a legal proceeding, whether or not certified or qualified, shall abide by a code of ethics established by supreme court rule." RCW 2.43.080.

General Rule (GR) 11.1(d) requires that no

> interpreter shall render services in any matter in which the interpreter is a potential witness, associate, friend, or relative of a contending

> party, unless a specific exception is allowed by the appointing authority for good cause noted on the record. Neither shall the interpreter serve in any matter in which the interpreter has an interest, financial or otherwise, in the outcome. Nor shall any language interpreter serve in a matter where the interpreter has participated in the choice of counsel.

Under RCW 2.43.030, when an interpreter is appointed, unless there is a written waiver by the non-English-speaking person, "a certified or a qualified interpreter [is] to assist the person throughout the [legal] proceedings."

Mr. Ekkert argues counsel was ineffective for failing to ensure the interpreter did not have a conflict of interest. But he does not identify how the interpreter had any conflict. A review of the record reflects that prior to the start of trial, the State indicated Mr. Ekkert was being assisted by certified court interpreter, Gregory Senchenko, who had worked for Anna Cutler, one of Mr. Ekkert's defense attorneys. The court inquired into the relationship with Mr. Senchenko. The State told the court it did not have any objection to Mr. Senchenko serving as an interpreter so long as Mr. Ekkert was aware of the situation and waived any objection to it. The court asked Mr. Ekkert whether he understood the relationship between Ms. Cutler and the interpreter. The court then told Mr. Ekkert that Mr. Senchenko had been asked to serve as the

interpreter in the case, due to a shortage of interpreters. Mr. Ekkert told the court "okay" and the use of Mr. Senchenko was acceptable to him. RP at 6.

The use of Mr. Senchenko as an interpreter did not violate GR 11.1. He was not a potential witness, associate, friend, or relative of Mr. Ekkert. Moreover, there was no indication that Mr. Senchenko had any interest in the case's outcome. The court noted Mr. Senchenko was serving as the interpreter in the case because of an interpreter shortage. Both the State and Mr. Ekkert waived any objection to using him. Nothing in the record shows Mr. Senchenko had a conflict of interest. Counsel was not ineffective.

Mr. Ekkert argues counsel was ineffective for failing to ensure an interpreter was present at all times during the trial. RCW 2.43.030 does state that "a certified or qualified interpreter [is] to assist the person throughout the [legal] proceedings," but there is no indication in the record to the contrary. Mr. Senchenko assisted for part of the trial. When he was unavailable, certified interpreter Ludmilla Badicke was used to translate for the witnesses. The use of Ms. Badicke was approved by Mr. Ekkert. Furthermore, the court asked Ms. Cutler whether a second interpreter was needed to assist with conferences between her and Mr. Ekkert. Ms. Cutler informed the court she also spoke

Russian and another interpreter was not required. Mr. Ekkert has not established counsel was ineffective.

In his statement of additional grounds for review, Mr. Ekkert argues he was denied effective assistance because defense counsel represented one of the State's witnesses and was now in a romantic relationship with this witness. Nothing in the record supports these claims. Because this argument deals with information outside of the record, it must be brought in a personal restraint petition. *See McFarland*, 127 Wn.2d at 338 n.5.

Mr. Ekkert next contends the evidence was insufficient to support his conviction for first degree assault with a deadly weapon. In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements of a crime may be established by either direct or circumstantial evidence, and one type is no more valuable than the other. *State*

v. Thompson, 88 Wn.2d 13, 16, 558 P.2d 202, *appeal dismissed*, 434 U.S. 898 (1977). "Credibility determinations are within the sole province of the jury and are not subject to review." *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Assessing discrepancies in trial testimony and the weighing of evidence are also within the sole province of the trier of fact. *State v. Longuskie*, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990).

"A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm[,] [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a). A knife with a blade of three inches or more is a deadly weapon. RCW 9.94A.602.

Mr. Ekkert argues there was insufficient evidence to prove he used any force or means to produce great bodily harm or death, or he acted with the intent to inflict great bodily harm, or he was armed with a deadly weapon. Mr. Kutsar testified they decided to follow Mr. Felten after he gave them the "middle finger." RP at 224. Mr. Kutsar said Mr. Ekkert told him he had stabbed Mr. Felten. He further testified Mr. Ekkert showed him the knife and the blade of the knife was between three to three and one-half inches.

Dr. Moore testified he treated Mr. Felten for a stab wound on his abdomen. The wound was 1.5 centimeters long. Dr. Moore was able to determine the direction of the wound as being upward. He said that based on the direction of the wound, he was concerned with any heart or lung-related injuries. Viewing this evidence in a light most favorable to the State, the evidence was sufficient to support the conviction for first degree assault with a deadly weapon.

Mr. Ekkert also contends Dr. Moore's testimony constituted improper expert testimony. He argues the doctor did not list his qualifications as a trauma surgeon and did not have any specialization in trauma. But Mr. Ekkert did not object to this evidence at trial. His objection is thus waived. *See State v. Newbern*, 95 Wn. App. 277, 291, 975 P.2d 1041, *review denied*, 138 Wn.2d 1018 (1999).

Mr. Ekkert next contends the court erred by admitting evidence Mr. Felten identified him at the showup. After Mr. Felten was taken to a hospital room, Officer Madsen told him they were bringing a man up to his room. Officer Madsen told Mr. Felten, "I think we got him. I just need you to identify this person to see if it is." RP at 110. Mr. Felten said he told the officer he was scared and did not want Mr. Ekkert to see him. Officer Madsen said she would turn off the

lights and shine a flashlight on Mr. Ekkert's face.

Prior to trial, Mr. Ekkert moved to exclude the showup identification evidence. The court denied the motion. We review the court's decision to admit an out-of-court identification for abuse of discretion. *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001), *review denied*, 146 Wn.2d 1022 (2002). The test is whether there are tenable grounds or reasons for the trial court's decision. *Id.*

An out-of-court identification comports with due process if it is not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); *State v. Maupin*, 63 Wn. App. 887, 896-97, 822 P.2d 355, *review denied*, 119 Wn.2d 1003 (1992). A two-step test is used to make this determination. First, the defendant must show the identification procedure was suggestive. *State v. Vaughn*, 101 Wn.2d 604, 608-09, 682 P.2d 878 (1984). If there is no evidence of suggestiveness, the inquiry ends and any uncertainty or inconsistency in the identification goes to the weight of the evidence. *Id.* at 610; *State v. Hendrix*, 50 Wn. App. 510, 513, 749 P.2d 210, *review denied*, 110 Wn.2d 1029 (1988).

If the defendant does show the identification procedure was suggestive, the court must decide whether the suggestiveness created a substantial likelihood of irreparable misidentification. *Maupin*, 63 Wn. App. at 897. This determination is guided by the judicially imposed factual considerations set forth in *Manson v. Brathwaite*, 432 U.S. 98, 114-16, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977): (1) the witness's opportunity to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of any prior description; (4) the witness's level of certainty demonstrated at the confrontation; and (5) the length of time between the crime and the identification. *See Kinard*, 109 Wn. App. at 434. When the court makes these required findings and they are supported by substantial evidence, this in turn lends tenability to its decision to admit the identification evidence. *Id*. at 434-35.

On the other hand, if a pretrial identification created a substantial likelihood of misidentification, an in-court eyewitness identification is likewise suppressible. *State v. Williams*, 27 Wn. App. 430, 443, 618 P.2d 110 (1980) (citing *Simmons*, 390 U.S. at 384), *aff'd*, 96 Wn.2d 215, 634 P.2d 868 (1981).

Mr. Ekkert argues the showup identification became impermissibly suggestive when Officer Madsen told Mr. Felten "we got him." Appellant's Br. at

34. But showup identifications are not per se impermissibly suggestive. *State v. Guzman-Cuellar*, 47 Wn. App. 326, 335, 734 P.2d 966, *review denied*, 108 Wn.2d 1027 (1987). The defendant has the burden of demonstrating that a showup identification procedure was impermissibly suggestive. *Id*.

Here, we will assume the officer's comment rendered the identification impermissibly suggestive. *See State v. Eacret*, 94 Wn. App. 282, 283, 971 P.2d 109 (1999). This court must therefore turn to the five factors concerning the reliability of the identification.

First, Mr. Felten had face-to-face contact with Mr. Ekkert. Mr. Felten said at the time of the stabbing, he was looking straight into his attacker's eyes and Mr. Ekkert was one to two feet away from him. Second, the record indicates Mr. Felten was attentive during the encounter. He testified Mr. Ekkert stood in front of him with his hand behind his back. Mr. Felten said he kept his eyes both on the people surrounding him and Mr. Ekkert's hand. Third, the court found the description given by Mr. Felten was not "so far off" to call into question whether it was the same person. RP at 38. Fourth, Mr. Felten said that at the time of the identification, he was "positive" and "really certain" the person the police brought to show him was the person who stabbed him. RP at 96. Finally, the time

between the stabbing and the identification was very short.

Based on these factors, the suggestive showup procedure did not create a substantial likelihood of irreparable misidentification. The court properly admitted the showup identification evidence.

Mr. Ekkert contends the doctrine of cumulative error requires reversal. Under this doctrine, a defendant may be entitled to a new trial when errors cumulatively produced a fundamentally unfair trial. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). But when no prejudicial error is shown, cumulative error could not have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025 (1990). The cumulative error doctrine is inapplicable.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kato, J.

WE CONCUR:

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Schultheis, A.C.J.

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Kulik, J.